(29,660)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 352

THE PEOPLE OF THE STATE OF NEW YORK, PETITIONER,

vs.

LOUIS JERSAWIT, AS TRUSTEE IN BANKRUPTCY OF AJAX DRESS COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1923

[fols. 1-3] **UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

In the Matter of AJAX DRESS CO., INC., Bankrupt

CLAIM OF STATE OF NEW YORK FOR FRANCHISE TAX, FILED WITH REFEREE IN BANKRUPTCY IN COVER, CLAIMING PRIORITY OF PAYMENT AND LIEN

Additional Statement

March 24, 1922.

Ajax Dress Co. Inc., 15 East 26th St., Moses & Singer, Attys. for Trustee, 55 Liberty Street, New York City, in Account with the State of New York, Dr.

State Tax Department, Albany, N. Y., Finance Bureau

Additional statement of your account is hereby rendered for taxes due on or before January 1, 1921, payable without penalty at that time, or within 30 days from November 4, 1920, the date under which these taxes (prior lien) were originally noticed to you pursuant to Article 9-A of the Tax Law, as amended.

Money order, draft or certified check made payable to State Tax Commission, Albany, N. Y., should be forwarded to this bureau, with this form.

[fol. 4] State Franchise Tax on Business Corporations under Article 9-A of the Tax Law as Amended

Postage stamps and uncertified checks not accepted.

For Period Ending October 31, 1921

Tax based on income 4½%	$448 34
Tax based on cap. stock at 1m	.....
Minimum tax	.....
Penal interest, etc.	87 03
Total	$535 37

Received Payment,

—— ——, Assistant Deputy Commissioner.

To Louis Jersawit, 2 Rector Street, N. Y. City:

Please *tax* notice that annexed hereto in a statement of franchise taxes due the State of New York and for which the State of New York claims a preference over and above all the debts of the bank-

rupt and claims submitted to you and demands that said amount be forthwith paid by you in full out of any moneys now in or which may hereafter come into your possession.

Dated, March 30, 1922.

Charles D. Newton, Attorney-General of the State of New York, Office and P. O. Address Capitol, Albany, N. Y.

[fol. 5] HEARING BEFORE REFEREE ON CLAIM OF STATE OF NEW YORK IN RE AJAX DRESS CO., No. 28834

Before Hon. John J. Townsend, Referee

Final Meeting of Creditors, Held Pursuant to Notices Mailed April 1, 1922

New York, April 12, 1922, at 11.45 a. m.

Present: Moses & Singer, by Mr. Rubenstein, for the trustee; Charles P. Robinson, Deputy Attorney-General, for State of New York; Samuel Gorschen, secretary of the bankrupt.

The Referee: I have before me the Trustee's final report, filed March 11, 1922, showing a balance of $3,400.39.

I have before me the petition and application of Moses & Singer, for an allowance as attorneys for the Trustee.

I have also before me the application of the appraisers for an allowance, filed April 8, 1922.

I want to know are there any other applications? I call attention to the claim of the State of New York, filed April 3d at $535.37, for a franchise tax for the period ending October 31, 1921. In this case the petition was filed against the bankrupt corporation on December 22, 1920. Are there any other applications? Otherwise, I will proceed to consider each application separately.

Are there any objections to the Trustee's report as filed? I hear no response. Do you move to sell the outstandings mentioned in [fol. 6] Schedule A annexed to the Trustee's report?

Mr. Rubenstein: I do.

The Referee: I offer for sale the right, title and interest of the bankrupt estate in those outstandings without any representation of any kind. I will offer all three items together, unless some bidder wants me to offer one item at a time. If not, I will offer all three. What am I bid for them?

Mr. Gross: Five dollars.

Mr. Gorschen: Fifteen dollars.

The Referee: Are there any higher bids? First call, second call, third and last call, sold to Mr. Gorschen at $15, for Samuel Trokie, 339 Vermont Street, Brooklyn.

The Referee: I have the application of Messrs. Moses & Singer,

attorneys for the Trustee. Is there anything to be said outside of the filed application?

Mr. Rubenstein: No, sir, except that we feel that the services rendered justify double the Trustee's commissions.

The Referee: Do you ask for a certificate?

Mr. Rubenstein: No, sir. We leave it to your honor, and make the suggestion that we be allowed double the Trustee's commissions.

The Referee: Is there anything to be said on the application of the appraisers?

[fol. 7] Mr. Rubenstein: No, sir, nothing in addition to their petition.

The Referee: I will hear the Trustee's objections to the claim of the State of New York.

Mr. Rubenstein: The tax for which claim has been filed by the State of New York is based upon the franchise, and that franchise was only exercised by the bankrupt company for a period from October to December of 1920, or about one and two-thirds months. I make objection to the claim on the ground that the claim is subject to apportionment by the court, and should be apportioned by reason of the fact that the corporation never exercised its charter beyond that one and two-thirds months. I also object to the claim on the ground it provides for a penalty as against the estate, and that the court has no jurisdiction to enforce a penalty against the estate where the estate was in process of administration.

The Referee: You mean the penalty is not to be allowed under Section 57-j?

Mr. Rubenstein: Yes.

Mr. Robinson: I would like to have three or four days in regard to the penalty part, within which to advise the Tax—the State Tax Department. I don't think they are entitled to the penalty.

The Referee: I will rule upon that now. I will not keep this open. I will make a separate order disallowing the penalty.

Mr. Robinson: And in regard to the other issues.

[fol. 8] The Referee: I shall sustain the objection to the penalty, and will enter a separate order, if desired, to that effect.

Mr. Robinson: I don't ask you to do that.

The Referee: It is only to reserve your rights. The period is said to be twelve months ending October 31, 1921. That is the period of exercise—the tax is payable as stated in advance. It is payable in November of 1920.

Mr. Robinson: If the court please, as you undoubtedly know, every corporation in July of every year files a return with the State Tax Department of its income as shown on its return to the United States treasurer for the preceding calendar year. The State Tax Department then audits and states that tax of four and a half per cent on that income and sends a bill for it to the corporation, and the bill to this corporation, it appears from the statement was sent on November 4, 1920. The tax is audited and stated for the privilege of exercising the franchise in case of a domestic corporation for the year commencing the following November 1st—in this particular

instance, the company received notice on November 4, 1920, of the audit and statement of the tax in the sum of $448.34.

The Referee: The exercised period was for the year ending October 31, 1921, beginning November 1, 1920?

Mr. Robinson: Section 219-C of the Tax Law provides that the franchise tax due from any corporation constitutes a lien upon all [fol. 9] real and personal property of that corporation from the time when the tax was payable, until it is paid in full. At the beginning of that Section 219-C it is provided that the tax is payable on or before January 1st of every year, and within thirty days after the notice of the audit of the tax was sent to the corporation. In this particular case, there can be no question, but what this tax constituted a lien or became a lien against all the real and personal property of this corporation on December 4, 1920, and there is very good ground for considering the tax a lien on November 1, 1920. The tax is payable in advance, it being a lien prior to the date of the adjudication of the bankrupt. There is, I believe, no authority for the apportionment of this tax, for the time during which the company actually exercised its franchise. Furthermore, the bankruptcy proceeding does not dissolve a corporation—a domestic corporation pays a tax for the privilege of exercising its franchise, and the company has had that privilege, notwithstanding the bankruptcy proceedings, during all of the year from November 1, 1920, to October 31, 1921.

The Supreme Court of the United States in the case of Marshall against the People, with which the Court is familiar held that the interpretation placed upon a lien of the State for its tax under said statute was conclusive upon it. The Court of Appeals in this State in the case of the New York Terminal Company against Gross, 204 New York, 512, held that the lien under the Tax Statute was superior to all other liens against the corporation, even though the other liens were prior in point of time, holding in that particular [fol. 10] case, that the lien of a franchise tax was superior to the lien of a mortgage which antedated the tax lien, and that it was collectable against a Receiver appointed in a mortgage foreclosure action. The United States Circuit Court of Appeals, and the Supreme Court of the United States has repeatedly held that franchise taxes are collectable against a Receiver. I think we are entitled to the priority of payment for the principal of the tax.

The Referee: I will dispose of this matter now. The State of New York is here asserting a franchise tax assessed under Section 209 of the Tax Law for the period beginning November 1, 1920, and October 31, 1921.

Such tax has been assessed under a report made by the bankrupt corporation under Section 211 of the Tax Law, based on the income of the corporation at that time, on or about July of 1919 or prior thereto.

The tax normally if the corporation had been a going concern was payable in advance in November of 1920, under Section 219 of the Tax Law, and in particular subdivision 219-C of that Section

219, declares the tax to be a lien from the time when it is payable until it is paid in full.

In this proceeding, the petition in bankruptcy was filed against the corporation on December 27, 1920, and the Referee is of the opinion that at the utmost the corporation exercised its franchise during — ending October 31, 1921, for an outside period of two months, beginning November 1, 1920.

The Referee is of the opinion that the bankruptcy Court is clothed with jurisdiction under Section 64-A of the Bankruptcy Statute on [fol. 11] the objections of the Trustee to determine the amount or legality of any tax asserted.

Accordingly, the Referee will allow the asserted tax at two-twelfths of the amount, and exclude any penal interest.

If desired by the Attorney-General, the Referee will make a separate order containing this feature of the case, so that it may be reviewed, pending the making of the final order in the bankruptcy proceeding.

Mr. Robinson: I except to the ruling of the Referee, and ask that a separate order be entered.

The Referee: Prepare an order on notice to the Attorney-General.

Hearing closed.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MEMORANDUM OF REFEREE DENYING APPORTIONMENT OF TAX

Memorandum of Referee

On December 22, 1920, a petition in bankruptcy was filed against [fol. 12] the Ajax Dress Co., Inc., which I assume was a domestic manufacturing or mercantile corporation.

On April 3, 1921, the State of New York filed a proof of claim for a State Franchise Tax based on income at 4½% ($448.34) and "penal interest, etc." at $87.03, making a total of $535.37.

The proof of claim states that the tax is "for the period ending October 31, 1921," which period, it is conceded, if the year beginning November, 1920: the tax being payable on or before January 1, 1921.

It is to be noted that the petition in bankruptcy was filed against the corporation on December 22, 1920.

The contention of the Trustee is that this tax should be apportioned and allowed only at roughly speaking, two-twelfths, viz.: for the month of November, 1920, and December, 1920, and that all interest, whether penal or otherwise, should be expunged.

The tax is assessed pursuant to the provisions of Section 209 of the Tax Law. This section as it now reads, provides that "for the privilege of exercising its franchises in this State in a corporate or organized capacity, every domestic mercantile corporation, and for

the privilege of doing business in this State, every foreign manufacturing and every foreign mercantile corporation * * * shall annually pay in advance for the year beginning November first next preceding, an annual franchise tax * * *

This Section 209, added to the Tax Law in 1917, follows the text of Section 182 of the Tax Law as the latter now reads since the [fol. 13] amendment of Section 182 by Chapter 333 of the Laws of 1916, which amendment was subsequent in date to the decisions of the New York Court of Appeals, mentioned below, interpreting Section 182 when the words "doing business or" preceded the words "exercising its corporate franchises" in that section.

Compare: People ex rel. L. & N. Y. R. R. Co. v. Sohmer, 217 N. Y. p. 443, and N. Y. Terminal Co. v. Gaus, 204 N. Y. 512.

In other words, since 1916 the Legislature seems to require the tax for the privilege of exercising corporate franchises, irrespective of whether or not the corporate franchises were exercised; establishing a rule in derogation of the former rule as interpreted by the New York Court of Appeals in 217 N. Y. 443.

I repeat, Section 209 in substance follows the language of Section 182 as the latter reads to-day.

The principal question before me is whether or not the franchise tax assessed under Section 209 is apportionable, in view of the fact that the business of the corporation ceased on December 22, 1920, when a petition in bankruptcy was filed against it, viz.: some two months subsequent to November 1, 1920.

No question as to the amount of the tax, viz.: whether the tax has been computed upon the basis mentioned in Section 209, is raised to be heard and determined by me under Section 64-a of the Bankruptcy Act: In re Anderson, 48 A. B. R. 350.

As supporting a right of apportionment, the Trustee cites the de- [fol. 14] cision of New York Court of Appeals in the People ex rel. Mutual Trust Co. v. Miller, 177 N. Y. 51, and more particularly at the top of page 55.

In this decision the Court of Appeals apportioned a tax stating that if the Company ceases to do business six days after the year begins, the tax for doing business by the year requires apportionment.

This case was decided in December, 1903, under the section of the Tax Law cited at page 53 of the report.

The statute before the Court of Appeals in 177 N. Y. 51 now appears, unchanged, in Section 188 of the present Tax Law.

It will be noted that this Section 188, relating to trust companies, and its fellow Section 187, relating to insurance companies, provides that the franchise tax shall be paid annually for the privilege of exercising the corporate franchise of the corporation or carrying on its business in a corporate or organized capacity; differing thus from Section 182 as amended in 1916 and from Section 209 which follows Section 182 as amended. Neither does the feature of payment in advance appear.

The foregoing analysis shows that the New York Court of Appeals has not passed upon the apportionability of a franchise tax im-

posed either under Section 182 or under Section 209, commented upon above, where the tax is payable in advance.

In my opinion, the filing of the petition in bankruptcy and the closing of the doors of the factory of the Ajax Dress Co. in law did [fol. 15] not suspend or impair in any way the corporate franchise granted to the corporation by the State of New York, or take away from the corporation the privilege granted by the State of exercising its corporate franchises in the State if it could secure the necessary funds.

In my opinion, the tax imposed under either Section 209 or Section 182, as amended, is a payment for a privilege whether exercised or not, and is due annually from the corporation until its franchises are withdrawn by the legal dissolution of the corporation, provided always that such tax or payment has been computed or ascertained in the manner required by Section 209 and Section 182, as amended.

I have before stated that the computation of the tax in the case before me is not assailed.

These views lead me to deny the application to apportion the tax which is payable annually in advance on "or before" January first of each year, which in the present case means January 1, 1921, or before that day.

In the absence of other reason for the apportionment of the tax, the fact that the tax is payable in advance on or before January 1, 1921, for the year beginning November 1, 1920, affords, in my opinion, no reason for apportionment. As is well known, rent due and payable in advance (for the unenjoyed privilege of occupation of premises) is never apportioned in bankruptcy.

The same seems to be true of taxes; In re Sherwoods, Inc., C. C. A. 2d Circuit, infra page 5.

There remains to be considered the rights of the State of New York arising under Section 219-c of the Tax Law when read in con- [fol. 16] nection with Sections 64-a and 57-j of the Bankruptcy Act.

It will be seen that Section 64-a is silent as to interest.

In re Fisher & Co., 17 A. B. R. 404, 413; 148 Fed. Rep. 907.

Normally, debts owing to an individual, carry interest only to the date when the petition in bankruptcy was filed.

Sexton v. Dreyfus, 219 U. S. 339; 25 A. B. R. 363, 4, 5.

Sexton v. Dreyfus is not, however, concerned with Section 57-j of the Bankruptcy Act.

Section 57-j reads as follows:

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty of forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Taxes are regarded as a debt by the Bankruptcy Act: In re Sherwoods, Inc., 31 A. B. R. 769, 772, foot p. 773; 210 Fed. Rep. 754.

Section 219-c of the Tax Law provides that the corporation shall pay "in addition to the amount of such tax, ten per centum of such amount, plus one per centum for each month the tax remains unpaid."

[fol. 17] The ten per centum is clearly a "penalty" and should be disallowed; nor do I understand the State to contend otherwise.

The State, however, claims the one per centum for each month the tax remains unpaid and claims it as "interest" and not as "penalty" within the provisions of Section 57-j of the Bankruptcy Act.

Were the question open, I would be of the opinion that the high rate of interest is a penalty, rather than interest, and that the purpose of Section 219-c is by punitive provisions to compel prompt payment of the tax.

Notwithstanding In re Kallak, 17 A. B. R. 415; 147 Fed. Rep. 276, or In re G. L. Schuyler & Co., 21 A. B. R. 428, In re Scheidt & Bros., 23 A. B. R. 778, 177 Fed. Rep. 599, or Ramirez-Quinones, 39 A. B. R. 320, 323, I should follow In re Ashland Emery & Corundom Co., 36 A. B. R. 194; 229 Fed. Rep. 829, which allows interest to date of payment, but only at the usual rate of six per centum, were it not for the decision of the Circuit Court of Appeals, 4th Circuit, in U. S. v. Guest, 143 Fed. Rep. 456, which I read as holding a similar statutory provision as prescribing interest and not imposing a penalty.

I cannot see the pertinency to the present controversy of Marshall v. The People, 254 U. S. 380, 383, 384.

These views entitle the State of New York to an order denying the motion of the Trustee.

J. J. Townsend, Referee in Bankruptcy. New York, October 3, 1922.

[fol. 18] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER OF REFEREE ALLOWING TAX WITH INTEREST AT ONE PER CENT A MONTH AND GRANTING PRIORITY

A final meeting of the creditors of the above named bankrupt having, pursuant to notice, been duly held before me at my office No. 299 Broadway, Borough of Manhattan, City of New York, on the 12th day of April, 1922, at 11:45 a. m. at which time and place objections were made by the trustee to the claim of the State of New York filed herein on the 3d day of April, 1922, in the sum of Five hundred and Thirty-five and 37/100 ($535.37) Dollars for a franchise tax for the period ending October 31, 1921, against the above named bankrupt corporation and the State of New York having duly appeared upon said hearing by the Attorney-General of the State of New York, by Charles P. Robinson, Deputy Attorney-General, of

counsel, the trustee having been represented by Messrs. Moses & Singer, Abraham H. Rubenstein, of counsel, and the objection to said claim having been duly stated by the trustee's counsel upon the record taken at said hearing, and after having heard the Attorney-General in support of said claim and the trustee's counsel in support of the objections to said claim, and due deliberation having been given to the said claim of the State of New York and the objections interposed thereto by the trustee herein, and upon the claim filed by the State of New York herein on the 3d day of April, 1922, [fol. 19] for Five hundred and thirty-five and 37/100 ($535.37) Dollars and the objections thereto, and upon the minutes of the hearing had before me on the 12th day of April, 1922, at 11:45 a. m., it is

Upon motion of Charles D. Newton, Attorney-General of the State of New York,

Ordered, that the claim of the State of New York, filed herein on the 3d day of April, 1922, for a franchise tax for the period ending October 31, 1921, be and the same hereby is allowed in the sum of Four hundred forty-eight and 34/100 ($448.34) Dollars for the principal of said tax and interest upon said principal at the rate of one per cent a month from January 1st, 1921, to the date of the payment of said tax, in addition to the said principal sum, and that said claim be allowed as one entitled to priority of payment.

J. J. Townsend, Referee in Bankruptcy. Dated New York City, N. Y., November 2, 1922.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION OF TRUSTEE TO REVIEW ORDER OF REFEREE

To the Honorable John J. Townsend, referee in Bankruptcy:

The petition of Louis Jersawit, respectfully shows to this Court and alleges:

I. That he is the Trustee in Bankruptcy of the Ajax Dress Company, Inc., the above named bankrupt, and that as such he has duly qualified.

[fol. 20] II. That in the course of the proceedings in the above entitled matter, on the 2d day of November, 1922, an order, a copy of which is hereto annexed, was made and filed in the office of Honorable John J. Townsend, Referee in Bankruptcy.

III. That such order was and is erroneous in that (a) it allows the claim of the State of New York filed herein on the 3d day of April, 1922, for a franchise tax for the period ending October 31,

1921, in the sum of Four Hundred Forty-eight Dollars and Thirty-four cents ($448.34) for the principal of said tax, and interest upon said principal at the rate of One per cent (1%) per month from January 1, 1921, to the date of the payment of said tax, in addition to the said principal sum; (b) it fails to apportion the tax claimed by the State of New York as a franchise tax, which is assessed for a period commencing November 1, 1920, for one (1) year in advance, although the petition in bankruptcy was filed on the 22d day of December, 1920, and said franchise tax so assessed had only become due at the time of the bankruptcy petition to the extent of two-twelfths (2/12) of a year or one-sixth (1/6) of the amount of the tax; and (c) it allows interest on the amount of the assessment at the penal sum or rate of one per cent (1%) per month in violation of Section 57-J of the National Bankruptcy Act.

Wherefore, your petitioner feeling aggrieved because of said order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order XXVII.

Dated, New York, November 3, 1922.

Louis Jersawit, Trustee, Petitioner.

[fols. 21 & 22] Affidavit of Louis Jersawit to above paper omitted in printing.

Order of Referee Mentioned in Petition for Review—Omitted; printed side page 18 Ante

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[fol. 23] United States District Court, Southern District of New York

[Title omitted]

Referee's Certificate on Petition to Review

To the honorable judges of the District Court of the United States for the Southern District of New York:

I, John J. Townsend, Referee in Bankruptcy, do hereby certify: That in the course of the proceedings had before me herein, the following question arose pertinent to the proceedings:

Under date April 3, 1921, the State of New York filed a proof of claim for a franchise tax based on income at 4½% $448.34 and "penal interest, etc." at $87.03, making a total of $535.37.
[fol. 24] The proof of claim states that the tax is "for the period ending October 3, 1921," which period, it is conceded, is the year beginning November, 1920: the tax being payable on or before January 1, 1921.

The petition in bankruptcy in this case was filed against the corporation on December 22, 1920.

The Trustee contends that this tax should be apportioned and allowed only at, roughly speaking, two-twelfths, viz.: for the month of November, 1920 and December, 1920, and that all interest, whether penal or otherwise, should be expunged.

After consideration, I decided that the State of New York was entitled to an order denying the motion of the Trustee and allowing the claim of the State of New York at $448.34 with interest at the rate of 1% per month from January 1, 1921 to the date of payment, and that such claim be allowed as one entitled to priority of payment; and on November 2, 1922 I filed an order to that effect.

On November 3, 1922, the Trustee filed with me his petition for review, of such order, which was granted.

The question presented on this review is whether the Referee was correct:

(1) In allowing the claim of the State of New York as filed, with interest at the rate of 1%; and

(2) Denying the motion of the Trustee to apportion the said tax.

The question presented, a summary of the evidence relating thereto, and the findings and order of the Referee thereon will be [fol. 25] found in the Referee's Memorandum dated October 3, 1922.

I hand up herewith for the information of the Judges the following papers:

(1) Proof of claim State of New York, filed April 3, 1921.

(2) Order of Referee allowing claim only at $74.72 (this order was subsequently vacated and hearing on the claim reconsidered by the Referee).

(3) Memorandum of Referee, dated October 3, 1922.

(4) Order allowing claim of State of New York at $448.34 with interest at 1% per month.

(5) Petition for review of Trustee, filed November 3, 1922.

New York, November 23, 1922.

J. J. Townsend, Referee in Bankruptcy.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF HEARING OF PETITION TO REVIEW

SIR: Please take notice that the certificate of John J. Townsend, Referee in Bankruptcy, dated the 23d of November, 1922, on re- [fol. 26] view of Referee's order allowing the claim of the State of

New York at Four Hundred Forty-eight and 34/100 Dollars ($448.34) with interest at the rate of 1% per month from January 1, 1921, to the date of payment, has been duly filed in the office of the Clerk of the United States District Court for the Southern District of New York, and you will further

Please take notice that we shall move this Court at a stated term thereof to be held at the court house thereof, in the Post Office Building in the Borough of Manhattan, City of New York, on the 29th day of November, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard, for a hearing upon the petition of the Trustee herein for the review of the aforesaid order, said petition being dated the 3rd of November, 1922, and for an order of this Court reversing the order of the Referee herein, and granting the motion of the Trustee herein to apportion the franchise tax for which claim has been filed by the State of New York herein, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, November 27, 1922.

Yours, etc., Moses & Singer, Attorneys for Trustee, Office and P. O. Address 55 Liberty Street, New York City. To Hon. Charles D. Newton, Attorney-General of the State of New York, 51 Chambers Street, New York City.

[fol. 27] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

OPINION OF DISTRICT COURT ON HEARING OF PETITION TO REVIEW

Moses & Singer, Solicitors for Trustee.

Charles D. Newton, Attorney-General for the State of New York, Charles P. Robinson, Assistant.

AUGUSTUS N. HAND, District Judge:

This is a proceeding to revise an order of the referee allowing the claim of the State of New York for franchise taxes for $488.34, and interest thereon at the rate of one per cent. per month from January 1, 1921. Section 209 of the Tax Law of the State of New York (as amended by the Laws of 1919) is as follows:

"Franchise tax on corporations based on net income. For the privilege of exercising its franchise in this state in a corporate or organized capacity, every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except corporations specified in the next section, shall annually pay in [fol. 28] advance for the year beginning November 1st next preceding an annual franchise tax, to be computed * * *."

In the case of People ex rel. Mutual Trust Company v. Miller, 177 N. Y. 55, the statute affecting trust companies was under consideration which provided that

"Every trust company incorporated, organized or formed under, by or pursuant to a law of this state, * * * shall pay to the state annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to one per centum on the amount of its capital stock, surplus, and undivided profits. * * *."

The trust company in that case was organized on the sixth day of June, and began to do business on the twenty-fourth. Its capital was three hundred thousand dollars; its surplus paid in with the capital was sixty thousand dollars. The Court of Appeals held that the tax was upon

" * * * the privilege of exercising, not of possessing, a corporate franchise. This privilege was used by the relator for only six days during the fiscal year in question. It could not exercise its franchise for the entire year, because the state did not bring it into existence until the year had nearly expired. The consideration for the tax is the privilege of carrying on business, yet the relator, according to the requirement of the comptroller, was com- [fol. 29] pelled to pay for a privilege that it did not have and could not exercise during the greater part of the period for which the tax was laid. It used the privilege for only six days, but it is taxed for using it 365 days, during 359 of which it did no business and enjoyed no privilege. An annual tax is a tax reckoned by the year the same as annual rent or annual interest. An 'annual' tax imposed 'annually,' means a tax that is imposed once a year, computed by the year. If a trust company does not commence business until six days before the fiscal year ends, or if it ceases to do business six days after the year begins, the tax for doing business by the year requires apportionment. While the legislature did not so provide in express terms, it is a fair and reasonable implication from the words used that such was its intention."

It is to be noted that while apportionment was ordered by the foregoing decision that the tax was not under the terms of the particular statute there considered payable in advance, but in the case of People ex rel. L. & N. Y. R. R. Co. v. Sohmer, 217 N. Y. 443, Section 182 of the New York Tax Law was considered by the Court of Appeals which at that time provided:

"For the privilege of doing business or exercising its corporate franchise in this state every corporation * * * doing business in this state, shall pay to the State Treasurer annually, in advance, [fol. 30] an annual tax to be computed upon the basis of the amount of its capital stock, employed during the preceding year within this state upon each dollar of such amount."

Notwithstanding the fact that the tax was payable in advance, the court held that a domestic railroad corporation which had leased its railroad to a foreign railroad company but had received no rent and transacted no business except to keep alive its corporate existence by the election of its officers was not liable for a franchise tax for transacting business.

The referee in the present case laid special stress upon the change in the form of the statute in that Section 209, as amended, imposed a tax "for the privilege of exercising its franchise in this state in a corporate or organized capacity." I cannot see any substantial difference between this clause and the one considered in People ex rel. Mutual Trust Company v. Miller, supra, where it read "for the privilege of exercising its corporate franchise, or carrying on its business in such corporate or organized capacity."

As a matter of first impression the question would be very doubtful, and that it was doubtful in the minds of some of the Judges of the Court of Appeals appears from the dissenting opinion of Judge Bartlett in the case of People ex rel, Mutual Trust Company v. Miller, and of Seabury and Pound, JJ., in the case of People ex rel. L. & N. Y. R. R. Co. v. Sohmer, supra. The decisions of the highest court of the state construing the New York Statute are, of [fol. 31] course, binding and seem to me harmonious as to the correct interpretation of the statute. But irrespective of the meaning of the statute, the referee held:

"the filing of the petition in bankruptcy and the closing of the doors of the factory of the Ajax Dress Company in law did not suspend or impair in any way the corporate franchise granted to the corporation by the State of New York or take away from the corporation the privilege granted by the state of exercising its corporate franchise in the state if it could secure the necessary funds."

If I am correct in my understanding of the decisions of the New York Court of Appeals they have rested upon whether the corporate franchises were actually exercised. Judge Vann said in People ex rel. Mutual Trust Company v. Miller, supra (at p. 54):

"The tax under consideration is not imposed upon property, but upon a privilege. It is not imposed upon the privilege of becoming a corporation, for that would be an organization tax, payable but once for the entire period of corporate existence. It is imposed 'for the privilege of exercising' the corporate franchise, and is measured by the value of the investment made and used in carrying on the corporate business."

In the case of McCoach v. Minehill & Schuykill Haven R. R. Co., 228 U. S. 295, a corporation after operating its railroad for [fol. 32] many years leased it. The court said:

"We cannot, however, agree with the contention made in behalf of the Government that because the Minehill Company retains its fra-chise of corporate existence, maintains its organization, and

holds itself ready to exercise its franchise of eminent domain, or other reserved powers, if and when required by the lessee, and ready to resume possession of the property at the expiration of the lease, it is therefore to be treated as doing business, in respect of the railroad, within the meaning of the Corporation Tax Law."

See also Flint v. Stone Tracy Co., 220 U. S. 145, and 150.

The idea that the Ajax Dress Company was exercising its franchise in any practical sense when it was in bankruptcy would seem to be fanciful. An actual exercise and not the mere right without the power to exercise seem to furnish the test laid down by the New York Court of Appeals. The Company was engaged in business during but a portion of the taxable year preceding the filing of the petition under the doctrine laid down in People ex rel. Mutual Trust Company v. Miller, supra, and People ex rel. L. & N. Y. R. R. Co. v. Sohmer, supra. The intervention of the petition in bankruptcy, followed by the adjudication, made the conduct of the business by that corporation impossible.

[fol. 33] For the foregoing reasons the tax in this case should be apportioned.

In regard to interest it should be allowed unless it is at a penal rate. Anything which amounts to a penalty must be disallowed under Sec. 57-j of the Bankruptcy Act. As I have already held in the Matter of J. Menist Co., Inc., Bankrupt, in dealing with the Federal Income Tax Act (in an opinion filed December 5, 1922) the rate of one per cent. per month (here imposed by Sec. 219-o of the Franchise Tax Law) is essentially a penalty. In the case of J. Menist Co., Inc., supra, I followed the opinion of Judge Morton in the case of In re Ashland, Emery & Corundum Co., 238 Fed. 839, and allowed interest at six per cent. per annum, which is particularly justified here because it is the statutory rate which the laws of the State of New York impose upon individuals in the absence of some special agreement for less. Taxes are not like ordinary debts where interest is computed to the date of filing the petition but whatever interest is allowed runs to the date of payment. In re Kallak, 147 Fed. 276. I presume it will not be disputed by the State of New York that the full sum of ten per cent. imposed in the discretion of the State Tax Commission upon delinquent taxpayers is clearly a penalty.

Let the order be settled, upon notice, apportioning the franchise taxes and allowing interest at six per cent. on the tax as apportioned to the date of payment.

A. N. H., D. J. December 7, 1922.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF DISTRICT COURT REVERSING REFEREE'S ORDER

A final meeting of the creditors of the above named bankrupt, having pursuant to notice, been duly held before the Honorable John J. Townsend, Referee in Bankruptcy, at his office 299 Broadway, in the Borough of Manhattan, City of New York, on the 12th day of April, 1922, at which time and place objections were made by the Trustee to the claim of the State of New York filed herein on the 3d of April, 1922, in the sum of five hundred thirty-five dollars and thirty-seven cents ($535.37) for a franchise tax for the period ending October 31, 1921, against the above named bankrupt corporation, and after due consideration the Referee herein having made an order on the 2nd day of November, 1922, allowing the claim of [fol. 35] the State of New York filed herein on the 3d of April, 1922, for a franchise tax for the period ending October 31, 1921, in the sum of four hundred forty-eight dollars and thirty-four cents ($448.34) for the principal of said tax, and interest upon said principal at the rate of one per cent (1%) a month from January 1, 1921, to the date of the payment of said tax in addition to the said principal sum and the Trustee herein having been aggrieved by said order, and having filed a petition with the said Referee to review said order, which said petition was verified on the 3d day of November, 1922, and the said Referee thereupon having filed his certificate on review in the office of the Clerk of this Court, and a hearing upon the Trustee's petition to review having been duly had before this Court on the 29th day of November, 1922, and after hearing Moses & Singer (Henry B. Singer, of counsel) for the Trustee in support of said petition to review, and the Attorney-General of the State of New York, by Charles P. Robinson, Deputy Attorney-General, of counsel, in opposition to said petition to review, and due deliberation having been had thereon, and the opinion of this Court having been duly rendered and filed herein on the 7th day of December, 1922, reversing the order under review made by the Referee and upon all the papers and proceedings heretofore had therein, it is

Upon motion of Moses & Singer, attorneys for the Trustee herein,

Ordered that the order made by John J. Townsend, Referee in [fol. 36] Bankruptcy, on the 2d day of November, 1922, allowing the claim of the State of New York filed herein on the 3d day of April, 1922, for a franchise tax for the period ending October 31, 1921, in the sum of four hundred forty-eight dollars and thirty-four cents ($448.34) for the principal of said tax, and interest upon said principal at the rate of one per cent (1%) a month from January 1, 1921, to the date of the payment of said tax in addition to the said principal sum, be and the same hereby is reversed; and it is further

Ordered that the franchise tax of the State of New York against the estate in bankruptcy of the above named bankrupt, as set forth in its proof of claim filed with the Referee herein on the 3d of April,

1922, be and the same hereby is apportioned, and the claim for such franchise tax filed by the State of New York herein with said Referee in the sum of four hundred forty-eight dollars and thirty-four cents ($448.34), be and the same hereby is apportioned so that the same is reduced to the sum of sixty-two dollars and twenty-seven cents ($62.27), representing the earned portion of said franchise tax for one and two-thirds ($1\frac{2}{3}$) months of the period of said tax, and that interest upon said claim as reduced to sixty-two dollars and twenty-seven cents ($62.27) be allowed at the rate of six per cent (6%) per annum from the 1st day of January, 1921, to the date of the payment of said tax as reduced and apportioned herein; and it is further

Ordered that said claim of the State of New York as apportioned [fol. 37] and reduced herein be allowed as a claim entitled to priority in payment out of the estate in bankruptcy of the above named bankrupt.

Augustus N. Hand, U. S. D. J.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

PETITION TO REVISE

To the honorable judges of the United States Circuit Court of Appeals, Second Circuit:

The petition of the People of the State of New York and the State Tax Department of the State of New York and the Attorney-General of the State of New York, respectively shows to this Court:

That on the 22d day of December, 1920, a petition in bankruptcy was filed against the Ajax Dress Company, Inc., in the District Court of the United States for the Southern District of New York, and thereafter the said bankrupt was adjudicated a bankrupt and the matter of the bankruptcy proceeding was referred generally to John J. Townsend, Esq., referee in bankruptcy of said District Court.

That on or about April 3, 1922, the People of the State of New [fol. 38] York and the State Tax Department filed with the referee in bankruptcy a claim for a State Franchise Tax based on the income of the calendar year 1919 at 4½ per cent, said tax being for the privilege of doing business for the year commencing November 1, 1920, and ending October 31, 1921, and being with the penal interest in the sum of $535.37.

At the final meeting of creditors of the above named bankrupt held before the said referee at his office on the 12th day of April, 1922, the trustee by his counsel made objection to the claim of the State of New York as filed and contended (1) that there should be an apportionment of the State franchise tax for the year beginning

November 1, 1920, as follows viz. that the tax claim should be allowed only for that portion of the year which elapsed between the beginning of the tax year, November 1, 1920, and the date of the filing of the petition in bankruptcy, December 22d, 1920; that the entire amount of the tax claim should thus be reduced proportionately as the elapsed period bore to the entire year, and (2) that the penal interest should not be allowed.

The referee wrote an opinion and made an order on the 2d day of November 1922, allowing the claim of the State of New York for franchise tax for the period ending October 31, 1981, in the principal sum of $448.34 and interest upon said principal sum at the rate of one per cent per month from January 1, 1921, to the date of the payment of said tax in addition to the said principal sum and the trustee having filed a petition to review the said order of the said ref- [fol. 39] eree and the said referee having thereupon filed his certificate on the review in the office of the Clerk of this Court and this matter having come on before Hon. Augustus N. Hand, United States District Judge, on the 29th day of November, 1922, an order was made by the United States District Court for the Southern District of New York on the 20th day of December 1922, reversing the order of John J. Townsend, referee in bankruptcy made on the 2d day of November, 1922. The said order of the United States District Court of the 20th day of December, 1922, provided that the claim of the State of New York for franchise tax be apportioned as urged by the trustee for the period of the year that elapsed between November 1, 1920, and the date of the filing of the petition in bankruptcy, December 22, 1820, or a period of one and two-thirds months of the taxable year. As so apportioned, the principal of the tax was reduced to the sum of $62.27, and the interest upon said claim was allowed at the rate of only six per cent per annum from the 1st day of January, 1921, to the date of payment and the said claim as apportioned and reduced was allowed as one entitled to priority of payment.

Your petitioners further avow that the said order or judgment or decree of the said District Court made and entered on the 20th day of December, 1922, was and is erroneous in matters of law in that the said District Court committed the following errors:

First. That the United States District Court for the Southern District of New York erred in reversing the order of the referee [fol. 40] dated November 2, 1922, and in apportioning the tax claim which was filed by the State Tax Department.

Second. That the said United States District Court for the Southern District of New York in its order reversing said order of the referee erred in so far as the said order found and decided that the tax could be apportioned for the period of the taxable year that elapsed prior to the filing of the petition in bankruptcy.

Third. That the said Court in its order (and opinion upon which said order was based) erred in holding that the franchise tax, claim for which was filed with the referee in bankruptcy, was one for

the actual exercise of a franchise and not for the privilege of exercising a franchise.

Fourth. That the said Court in its order reversing the order of the referee (in the opinion upon which the said order was based) erred in finding and deciding that this tax could be apportioned, notwithstanding the fact that the Statute Law of New York made the tax payable in advance.

Fifth. The said Court in its order reversing the said order of the referee and the opinion upon which the said order was based, erred in its failure to find that the said tax, claim for which was filed, was based upon the income for the calendar year 1919, as shown in the return made by this company to the United States Treasury, and was at the rate of 4½ per cent and was audited and stated by the State Tax Department for the privilege of doing business for the year commencing November 1, 1920, and ending October 31, 1921, and was payable in advance by the terms of the New York Statute.

[fol. 41] Sixth. That the said Court erred in reversing the said order of the said referee, in that it failed to recognize the lien created by the Statute Law of the State of New York for said tax from the time that it is payable until it is paid in full.

Seventh. The said Court erred in reversing the said order of the said referee in reducing the interest upon the said claim from one per cent a month to six per cent per annum, notwithstanding the fact that the Statute Law of the State of New York provides for interest at the rate of one per cent a month.

Wherefore, your petitioners, feeling aggrieved because of said order or judgment or decree, pray that the same may be revised in the matter of law by your Honorable Court, as provided in Paragraph 24b of the Bankruptcy Law of 1898, and the rules and practice in such case made and provided.

The People of the State of New York and the State Tax Department, by Charles D. Newton, Attorney-General.

Affidavit of Charles P. Robinson to above paper omitted in printing.

[fol. 42] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL AND ALLOWANCE

To the honorable, the judges of the United States District Court for the Southern District of New York:

The People of the State of New York and the State Tax Department, feeling aggrieved by the order and decree in the United States [fol. 43] District Court for the Southern District of New York, made by the Honorable Augustus N. Hand, one of the Judges thereof, entered herein on the 20th day of December, 1922, in the above entitled proceedings, reversing the order of John J. Townsend, Esq., referee in bankruptcy, dated November 2, 1922, and further apportioning a franchise tax audited and stated by the State Tax Department upon income for the calendar year 1919 for the privilege of doing business for the year commencing November 1, 1920, and ending October 31, 1921, for that period of the year that elapsed between November 1, 1920, and the date of the filing of the petition in bankruptcy herein, namely, December 22, 1920, does hereby petition for an appeal upon the said order and decree to the United States Circuit Court of Appeals for the Second Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, December 22, 1922.

People of the State of New York and The State Tax Department, by Charles D. Newton, Attorney-General of the State of New York.

The foregoing appeal is hereby allowed December 28, 1922.
J. W. Mack, U. S. Circuit Judge.

[fol. 44] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

SIRS: Please take notice that the People of the State of New York and the State Tax Department hereby appeal from the order and decree of the United States District Court for the Southern District of New York, made by the Honorable Augustus N. Hand, one

of the Judges thereof, and entered herein on the 20th day of December, 1922, reversing the order of Hon. John J. Townsend, referee in bankruptcy, dated the 2d day of November, 1922, and which order further apportioned a tax for that period of time that elapsed between the commencement of the year for the privilege of doing business, during which the tax had been audited and stated by the State Tax Department, and the date of the filing of the petition in bankruptcy, to the Circuit Court of Appeals for the Second Circuit, to be held in and for said Circuit at the United States Courts and [fol. 45] Post Office Building in the Borough of Manhattan, City of New York.

Dated, New York City, December 22, 1922.

Yours, etc., Charles D. Newton, Attorney-General of the State of New York, Office & Post Office Address 49 Chambers Street, Borough of Manhattan, City of New York. To Messrs. Moses & Singer, Attorneys for Trustee in Bankrupcy, 55 Liberty Street, New York City.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the People of the State of New York and the State Tax Department and file the following assignment of errors:

First. That the United States District Court for the Southern District of New York erred in reversing the order of the referee [fol. 46] dated November 2, 1922, and apportioning the tax, claim for which was filed by the State Tax Department.

Second. That the said United States District Court for the Southern District of New York in its order reversing said order of the referee, and the opinion upon which the said order was based, erred in so far as the said order and the opinion upon which it was based found and decided that the tax could be apportioned for a period of the taxable year that elapsed prior to the filing of the petition in bankruptcy.

Third. That the said Court in its order and opinion upon which said order was based, erred in holding that the franchise tax, claim for which was filed with the referee in bankruptcy, was one for the actual exercise of a franchise and not for the privilege of exercising a franchise.

Fourth. That the said Court in its order reversing the order of the referee and the opinion upon which the said order was based, erred in finding and deciding that this tax could be apportioned, not-

withstanding the fact that the Statute Law of the State of New York made the tax payable in advance.

Fifth. The said Court in its order reversing the said order of the referee and the opinion upon which the said order was based, erred in its failure to find that the said tax, claim for which was filed, was based upon the income for the calendar year 1919, as shown in the return made by this company to the United States Treasury, and was at the rate of 4½ per cent and was audited and stated by the State Tax Department for the privilege of doing business for the year com- [fol. 47] mencing November 1, 1920, and ending October 31, 1921, and was payable in advance by the terms of the New York Statute.

Sixth. That the said Court erred in reversing the said order of the said referee, in that it failed to recognize the lien created by the Statute Law of the State of New York for said tax from the time that it is payable until it is paid in full.

Seventh. The said Court erred in reversing the said order of the said referee in reducing the interest upon the said claim from one per cent a month to six per cent per annum, notwithstanding the fact that the Statute Law of the State of New York provides for interest at the rate of one per cent a month.

Wherefore, the People of the State of New York and the State Tax Department pray that the said order and decree herein for the manifest errors aforesaid, and for other errors in the record and proceedings herein, may be reversed and for naught held and esteemed; and that it may be restored to all matters and things which it has lost by reason of said order and decree, and that the United States District Court for the Southern District of New York may be directed to enter an order and decree herein affirming the said order of the said referee in bankruptcy.

Dated New York City, December 22, 1922.

Charles D. Newton, Attorney-General of the State of New York.

[fol. 48] CITATION ON APPEAL—Omitted in printing

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION CONSOLIDATING APPEAL AND PETITION TO REVISE—Filed Jan. 5, 1923

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the appeal and the petition to

revise from the order of the United States District Judge Augustus N. Hand entered in the office of the Clerk of the United States District Court for the Southern District of New York on December 20, 1922, be consolidated and printed in one record and that the said appeal and petition to revise shall be heard upon said record as consolidated.

Dated: January 4, 1923.

Carl Sherman, Attorney-General of the State of New York and Attorney for the State Tax Department and the State of New York, Appellants. Moses & Singer, Attorney for Trustee and Appellee.

So ordered: Henry Wade Rogers, U. S. C. J.

[fol. 50] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Record

STIPULATION ON APPEAL

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated: January, 1923.

Carl Sherman, Attorney-General of the State of New York and Attorney for Appellants. Moses & Singer, Attorneys for Appellee.

[fol. 51] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this — day of January in the year of our

Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk.

[fol. 52] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Appeal from an Order in Bankruptcy Entered in the District Court for the Southern District of New York

OPINION

The petition against the above named bankrupt was filed 22d December, 1920, and adjudication duly followed.

Against the estate the State Tax Department filed a claim for a "franchise tax, for period ending October 31, 1921"; the amount claimed being

For tax	$448.34
"Penal interest, etc."	87.03
Total	$535.37

The bankrupt was a manufacturing or mercantile corporation of the State of New York. The tax claimed arises under Section 209 of the Tax Law of New York, which, so far as material, reads thus:

"Franchise Tax on Corporations Based on Net Income

For the privilege of exercising its franchise in this State in a corporate or organized capacity, every domestic manufacturing and every domestic mercantile corporation * * * shall annually pay in advance for the year beginning November 1st next preceding, an annual franchise tax, etc."

The bankrupt ceased actual business on the day of petition filed, so that it exercised its franchise something less than two months out [fol. 53] of the twelve months for which the tax was levied and leviable.

The Court below apportioned the tax and allowed of the claim a fraction which represented the portion of the year during which the bankrupt exercised its franchise.

As Ajax Co. had not compiled with the statute and paid the tax, the State claimed under Section 219-c of said tax law

"In addition to the amount of said tax, ten per centum of such amount plus one per centum for each month the tax remained unpaid".

The Court below denied this claim, treating it as a penalty, but allowed six per cent interest on the apportioned tax to the day of the date of actual payment by the Trustee.

From the order embodying this decision the present appeal was taken.

Robert P. Beyer, Deputy Attorney General of the State of New York, for appellants;

Henry B. Singer for the Trustee in bankruptcy.

HOUGH, C. J.: The question whether that which the State calls a tax is a tax and a proper tax, produces a federal question under the Bankruptcy Act (New Jersey vs. Anderson, 203 U. S., 483). Yet under familiar rulings, the construction of a state statute and the definition of its terms are matters on which we should ordinarily follow the authority of the highest state court.

Therefore we regard the first branch of this case as raising only the question whether it is or is not governed by People vs. Mutual Trust Co., 177 N. Y., 51.

In that case the operative words of the statute were that the said Trust Company, being incorporated under the law of New York—

[fol. 54] "shall pay to the State annually for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity an annual tax", etc.

The Trust Company organized on June 6, 1901, and opened for business on June 24th. A tax was levied for the year ending June 30, 1901, and the state demanded that for the privilege of transacting business for six days it should pay the same tax that it would have paid for doing business three hundred and sixty-five days.

Vann, J. pointed out that the demand for "an annual tax imposed annually", and for the privilege of "exercising not of possessing a corporate franchise". Further that it could not "exercise its franchise for the entire year because the state did not bring it into existence until the year had nearly expired". The consideration for the tax was the privilege of carrying on business; yet the state was endeavoring to require the relator to pay for a privilege that it "could not exercise during the greater part of the period for which the tax was laid". Further, said the Court, an annual tax imposed annually meant a tax "imposed once a year computed by the year"; and the tax was "measured by an annual business done".

It was further pointed out that in People vs. Spring Valley Co., 92 N. Y., 383, there (and here) relied upon by the state,—the question of apportionment had been raised neither by the pleadings nor at trial, and although sought to be raised in the court of last resort, was not considered for obvious reasons.

The question now at bar is whether, since the present statute requires a corporation to pay the tax "annually in advance", the rea-

sons for the Mutual Trust Co. decision have been swept away by changing the language of the statute.

[fol. 55] Every reason advanced by the court in the Mutual decision is applicable here. The requirement to pay "annually in advance" is directory only; the tax was the same tax on the day of petition filed that it was on the first of November. Undoubtedly the state may exact a price for beginning a year's business, or charge the same price for the privilege of transacting business one day or one year. The question is not one of power, but of language, and we are of opinion that the changed language has not changed the nature of the tax. Comparing the Mutual case with this;—both taxes are franchise taxes; both are measured by business or the means of doing business; both are for the exercise of a franchise; neither is for the possession of a franchise, nor is either a price exacted on giving a franchise; in both the contemplation of law is that the franchise shall cover the business done thereunder for a year.

For these reasons we follow the Mutual decision in holding that the tax was properly apportioned below. The case of New York Terminal Co. vs. Gaus, 204 N. Y., 512, is not applicable; there a receiver had exercised the taxable franchise, and was held taxable thereon and therefor. Nothing of the sort is here suggested.

The inability of the Mutual Company to exercise its franchise for the yearly period was caused by non-existence; the inability of Ajax Co. to do the same, is caused by deprivation through bankruptcy of all means of exercising the privilege; the business and logical result is the same. The somewhat sardonic suggestion, that had Ajax Co. paid the tax and gone out of business or into bankruptcy in a few days, there would have been some difficulty in getting a rebate from the State, is not persuasive in law, though quite true in practice.

[fol. 56] So far as the state's second demand, for penalties and interest is concerned, the matter is covered by our opinion in Re Menist, filed today. That decision relates to a claim for interest at one per cent per month made by the United States in respect of its demand for lawful and unpaid taxes; but whatever is there said is applicable with equal force to the demand of the State of New York, nor only for one per cent a month, but for what is confessedly a penalty and called by that name.

Order affirmed with costs.

[fol. 56½] [File endorsement omitted.]

[fol. 57] At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 16th Day of April, One Thousand Nine Hundred and Twenty-three.

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

Decree

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed with costs.

C. M. H.
M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 58] [File endorsement omitted]

[fol. 59] Clerk's Certificate

United States of America,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 58 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Ajax Dress Company, Bankrupt, State of New York and State Tax Department, Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of April, in the year of our Lord One Thousand Nine Hundred and twenty-three and of the Independence of the said United States the One Hundred and forty-seventh.

Wm. Parkin, Clerk. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

[fol. 60] WRIT OF CERTIORARI AND RETURN—Filed July 7, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of Ajax Dress Company, Inc., Bankrupt, wherein The State of New York and State Tax Department are appellants, and Louis Jersawit, Trustee in Bankruptcy, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that [fol. 61] you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the Twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 62] [File endorsement omitted.]

[fol. 63] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Whereas the Supreme Court of the United States has heretofore granted the petition of the Petitioner-Appellant of the State of New York for a writ of certiorari to review the record in the above cause, and under date of June 23" 1923, issued its writ of *of* certiorari, directing the above court to send to it the record and proceedings in the above cause, and certified copy of said record and proceedings having heretofore been lodged in said court by the petitioner-appellant, now

It is hereby stipulated by and between the parties to the above entitled action that the certified copy of the record in the above case heretofore filed in the Supreme Court of the United States by the

petitioner-appellant, as a part of its petition as a writ of certiorari may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, a certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States, as his return to the writ of certiorari, issued out of the Su-[fol. 64] preme Court of the United States on the 23 day of June, 1923.

Dated: New York, June 30, 1923.

Carl Sherman, Attorney General, By Robert P. Beyer, Attorney for Petitioner-Appellant. Moses & Singer, By Henry B. Singer, of Counsel, Attorneys for Respondent.

[fol. 65] To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, July 3, 1923.

Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

[fol. 66] [File endorsement omitted.]

[fol. 67] [File endorsement omitted.]